No.: 557

IN THE

Supreme Court of the United States

October Term, 1940

IDA C. HAZZARD, *et al.*,

Petitioners,

against

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement.

This action was brought by petitioners in the Supreme Court of the State of New York "on behalf of themselves and of all other holders" of debentures of National Electric Power Company,[1] against The Chase National Bank of the City of New York,[2] The New York Trust Company and the Manufacturers Trust Company.

The gist of the complaint is that respondent, trustee of the trust indenture covering the issue of debentures, permitted withdrawal of securities so that such securities could be pledged with The New York Trust Company and the Manufacturers Trust Company for alleged loans to be used, in part, to pay indebtedness owing by NEP to respondent. The relief asked is that respondent be removed

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[1] Herein called NEP.

[2] Herein called respondent.

as trustee; that The New York Trust Company and the Manufacturers Trust Company be compelled to account, and that respondent be compelled to account and to respond in damages.

The action was tried before Mr. Justice Rosenman without a jury. The trial lasted more than six weeks and there were upwards of 3300 pages of testimony and more than 500 exhibits (R. 3644). The Trial Court dismissed the complaint on the merits as to The New York Trust Company and the Manufacturers Trust Company at the close of petitioners' case and as to respondent at the end of the whole case and passed upon 316 proposed findings of fact submitted by petitioners (R. 144-217) and 168 proposed findings of fact submitted by respondent (R. 223-273). Those findings and the refusals to find cover every phase of the evidence, oral and written, and furnish a complete answer to every contention of petitioners.

The complaint alleges that The Equitable Trust Company of New York, a banking corporation organized and existing under the laws of the State of New York (R. 31), became the trustee of an indenture of trust in 1928 (R. 31); that thereafter The Equitable Trust Company of New York was consolidated with respondent and "for a valuable consideration assumed all of the duties, obligations and liabilities of said The Equitable Trust Company of New York with respect to the performance and discharge of the duties of the trustee as, in, under and by the said trust indenture embodied and set forth" (R. 34, 35). The Trial Court so found (Findings 2, 15 and 18; R. 46, 48, 49).

The trust indenture was prepared by the investment bankers who made the public offering of the debentures and by the attorneys for NEP (Finding 17; R. 49), and in its final form was brought to The Equitable Trust Company

of New York, which was asked and consented to act as trustee.

The trust indenture, printed in uniform type and indexed, apprised the debenture holders not only of the terms and conditions on which the security was deposited, but also of the rights of the debenture holders, the rights reserved by NEP and the duties assumed by the trustee. Moreover, each of the debentures referred to the trust indenture for a "description of the property pledged, the nature and extent of the security, the rights of the holders of the debentures as to such security, and the terms and conditions upon which the debentures may be issued and are secured." (Ptfs.' Ex. 1; R. 2927.)

The trust indenture provides that the security deposited with the trustee shall be held subject to and in accordance with the provisions of the trust indenture (Finding 20; R. 49, 50). The trust indenture entitled NEP to withdraw and required the trustee to deliver to NEP any securities on deposit with the trustee upon NEP's written application provided that, as shown by an earnings certificate, the amount of earnings applicable to debenture interest for a specific twelve months' period* from the securities remaining on deposit and from the securities deposited simultaneously with such withdrawal, were at least equivalent to twice the annual interest requirements upon all debentures then outstanding (Finding 20; R. 50, 51). There are other provisions in the trust indenture having to do with the formalities and the machinery of substitution (Finding 20; R. 51, 52).

The trust indenture specifies the terms and conditions upon which the trustee accepted the trust (Finding 23; R. 55).

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* "For a period of twelve consecutive calendar months within the fifteen calendar months immediately preceding the date of the application for such withdrawal or release." (Article IX, Section 5.)

Section 20 of Article XV of the trust indenture provides, as far as here material, that "any * * * bank into which the trustee * * * may be consolidated * * * shall be successor trustee under this indenture without the execution or filing of any paper or any further act on the part of either of the parties hereto, * * * provided such successor trustee shall be a corporation organized under the laws of the State of New York, or a national banking association, and shall have an office for the transaction of its business in the Borough of Manhattan, City of New York (Ptfs.' Ex. 1, pp. 93-94; R. 2927). The Equitable Trust Company of New York was consolidated with respondent on May 31, 1930 (Finding 2; R. 46) and the latter thereupon became the successor trustee under the indenture of trust (Finding 16; R. 49).

The only trust relationship between NEP, respondent and the debenture holders came into being through the trust indenture executed by The Equitable Trust Company of New York. That trust indenture is the only document to which respondent, as successor trustee, became a party. That is the document which fixed the rights of NEP and the debenture holders, and the duties of respondent as successor trustee.

In December, 1931, NEP made application to respondent under Section 5, Article IX of the trust indenture, for withdrawal from under the trust indenture of a portion of the collateral on deposit and for the substitution of other collateral (Finding 234; R. 109, 110). The application, accompanied by an earnings certificate conforming to the requirements of the trust indenture (Finding 235, R. 110), was referred to an officer of respondent of many years' experience (R. 2849, 2850) in the trust department (Finding 236; R. 110). The trust officer checked the application with the provisions of the trust indenture (Finding

245; R. 113), checked the computations in the earnings certificate (R. 396) and then referred the application to counsel (Finding 245; R. 113). Counsel examined the application and the pertinent provisions of the trust indenture; later conferred with counsel for NEP with reference to suggested changes, and on December 21, 1931, the application was approved and the substitution was made (Finding 246; R. 113).

The application, including the earnings certificate, was prepared in accordance with the provisions of the trust indenture (Finding 238; R. 110). The earnings certificate correctly reflected the figures appearing on the books and records of the corporation whose securities were substituted (Finding 239; R. 111) and showed that the earnings applicable to debenture interest for the twelve months ending October 31, 1931, on the securities which remained on deposit and the securities received in substitution were $1,603,793.81 (Finding 241; R. 111). This was not only twice but more than three times the $500,000 interest requirements for one year upon all outstanding debentures (Ptfs.' Ex. 13; R. 2976).

The Trial Court not only found that respondent, as substituted trustee, was authorized by the specific provisions of the trust indenture to rely on the earnings certificate as conclusive evidence of the facts therein stated (Finding 255; R. 115), but also found that an investigation of the books and records of the corporation whose securities were substituted would have disclosed that the earnings certificate was correctly taken from such books and records (Finding 256; R. 115). Further pertinent findings of the Trial Court follow:

> "260. The trust indenture expressly permitted withdrawal and substitution of collateral from under

it on the terms and conditions specified therein." (R. 116)

"238. The application papers, including the earnings certificate, were prepared in accordance with the terms and provisions of the trust indenture." (R. 110)

"239. The earnings certificate, in determining the earnings applicable to debenture interest in accordance with the provisions of the trust indenture, correctly reflected the figures appearing on the books and records of National Public Service Corporation and its subsidiaries." (R. 111)

"264. Defendant The Chase National Bank acted in good faith in relying upon the application papers for the release and substitution of collateral under the indenture and in permitting the substitution of the collateral thereunder." (R. 117)

"265. Defendant The Chase National Bank met every requirement of the trust indenture at the time of the substitution and release of collateral thereunder." (R. 117)

"263. Defendant The Chase National Bank did not permit the release and substitution of collateral under the trust indenture in order to obtain profit for itself at the expense of debenture holders, nor was it actuated in any way by bad faith." (R. 117)

"312. Defendant The Chase National Bank did not profit directly or indirectly from the pledge of the collateral released from under the trust indenture with defendants New York Trust Company and Manufacturers Trust Company." (R. 126)

Petitioners requested the Trial Court to find that respondent "stood to profit", "profited", "expected to benefit", and "benefited" by the substitution. All of these requests to find were refused. The Trial Court refused to find that:

"257. Aside from their obligations under trust indentures as corporate trustees, all of the banks, including Chase National Bank, stood to profit by the substitution made by National Electric Power Company of National Public Service Corporation stock in place of the stock of Penn Central Light and Power Company, Ohio Electric Power Company and Michigan Electric Power Company under the indenture securing the plaintiffs. *Refused.*" (R. 213)

"258. Each of the defendants in this case did in point of fact profit by virtue of the substitution made. *Refused.*" (R. 213)

"268. The Chase National Bank expected to benefit itself from the substitution under the indenture securing the National Electric Power Company debenture holders. *Refused.*" (R. 216)

"256. Chase National Bank benefited by the substitution, which enabled National Electric Power Company to use a collateral theretofore securing debenture holders, to raise funds to prevent open defaults and thus keep National Electric Power Company going for another six months. *Refused.*" (R. 212-213)

The Trial Court did find that:

"303. Defendant The Chase National Bank did not permit the release and substitution of the collateral under the trust indenture for the purpose of making the released collateral available for pledge with defendant New York Trust Company or defendant Manufacturers Trust Company." (R. 124)

"304. Defendant The Chase National Bank did not learn of the pledge of the collateral released from under the trust indenture with defendants New York Trust Company and Manufacturers Trust Company until after the commencement of this action." (R. 124)

"316. Defendant The Chase National Bank did not conspire with defendants New York Trust Company and Manufacturers Trust Company or either of them to bring about a release of collateral from under the trust indenture on December 21, 1931, or at any other time." (R. 126)

"317. Defendant The Chase National Bank did not conspire with National Electric Power Company and National Public Service Corporation or either of them or any of their officers or directors to bring about a release of collateral pledged under the trust indenture." (R. 126-127)

"318. Defendant The Chase National Bank acted in entire good faith as trustee under the trust indenture of National Electric Power Company and fully complied with all of the provisions and requirements of the trust indenture." (R. 127)

"319. Defendant The Chase National Bank acted in entire good faith as trustee under the indenture of National Electric Power Company in all dealings with debenture holders." (R. 127)

The Trial Court also found that:

"95. At all times hereinafter mentioned the collateral securing the $6,000,000 demand loan made to National Electric Power Company on June 19, 1931, by defendant The Chase National Bank had a market value in excess of the face amount of the loan and the loan was at all times amply margined." (R. 74)

"150. None of the loans made by defendant The Chase National Bank to National Electric Power Company, Corporation Securities Company of Chicago, Martin J. Insull, Harry Reid, Martin J. Insull and Harry Reid, jointly, and Charles B. Zeigler was connected directly or indirectly with the substitution of collateral made under the trust indenture on December 21, 1931, hereinafter referred to." (R. 85)

On June 28, 1938, the Appellate Division of the Supreme Court, State of New York, First Judicial Department, unanimously affirmed, without opinion, the judgment of the Trial Court (257 N. Y. App. Div. 950; R. 3684, 3685).

On March 5, 1940, the Court of Appeals of the State of New York affirmed, without opinion, the judgment of the Appellate Division (282 N. Y. 652; R. 3690, 3691).

On May 23, 1940, petitioners moved to reargue and to amend the remittitur (R. 3707, 3708).

On June 11, 1940, both the motion to reargue and the motion to amend the remittitur were denied (283 N. Y. 132; R. 3705).

Concededly the alleged Federal question was raised for the first time on the motion to reargue (R. 3712, 3713; Petition, p. 5). It was then urged that some undesignated controlling Federal law distinguishing between the duties and liabilities of a state bank acting as trustee under a corporate trust indenture, and the duties and liabilities of a national bank acting under the identical instrument had been overlooked (R. 3709, 3710).

Petitioners moved for leave to reargue and to amend the remittitur in the following language:

> "1—that reargument be allowed, and thereupon the judgments below be reversed, or, at least, that the cause be remitted to the Trial Court for additional or revised findings;
>
> "2—that should reargument be granted but the Court adhere to its original decision, then that this Court indicate, in the amended remittitur, that a Federal question or claim herein was presented, considered and passed upon;
>
> "3—that should reargument be denied, in any event, that the Court amend the remittitur and indicate there-

in that a Federal question or claim herein was presented, considered, and passed upon;" (R. 3707, 3708)

The Court of Appeals denied the motion for reargument and the motion to amend the remittitur saying:

> "Ordered, that the said motion for reargument be and the same hereby is denied with ten dollars costs and necessary printing disbursements on the ground that it does not present either authority or reason for changing our decision that the liability of the corporate trustee though acting as a fiduciary was limited by the terms of the trust agreement (Benton *v.* Safe Deposit Bank of Pottsville, 255 N. Y. 260). Motion to amend remittitur denied." (R. 3705)

Petitioners quote portions of the opinion in inverted order and thus make it appear that the Court of Appeals considered and passed upon the alleged Federal question (Petition, p. 5). The language of the opinion shows the contrary.

* * * * *

We deem it important to point out some of the more glaring inaccuracies and distorted recitals of facts appearing in petitioners' "Statement" (Petition, pp. 11-20).

Although petitioners' "Statement" purports to be based upon facts "expressly found below", except for instances of "uncontradicted testimony" (Petition, p. 11), the "Statement" is interspersed with a highly colored, distorted, argumentative recitation of half-truths and, in some instances, of untruths. Petitioners state that respondent "benefitted by the substitution" (Petition, p. 11), that the Trial Court's "express findings show that Chase National both stood to profit and did profit from the substitution" (Petition, p. 24), that respondent "voluntarily placed itself in an adverse position where it stood to (and in fact did)

profit from the substitution'' (Petition, p. 25), and that ''if Chase National had not made this substitution it would not have profited'' (Petition, p. 28).

The Trial Court found the exact opposite of each and every above quoted statement. It found that respondent ''did not profit directly or indirectly'' (Finding 312, R. 126). The Trial Court expressly refused to find that respondent ''did in point of fact profit'' (Refusal 258; R. 213) or that respondent ''stood to profit by the substitution'' (Refusal 257; R. 213). The Trial Court further refused to find that respondent ''expected to benefit'' (Refusal 268; R. 216) or that respondent ''benefitted'' from the substitution (Refusal 256; R. 212-213). This finding and these refusals to find have been quoted in full at pages 6 and 7 of this Statement.

Petitioners state that the ''Trial Court ruled that the bondholder-cestuis were required affirmatively to prove Chase National's bad faith and had failed to sustain the burden of proof he thus imposed on them'' (Petition, p. 12), that the Trial Court ''put upon the bondholders the impossible burden of proving that the minds of this National Bank's officers were predominantly fraudulent'' (Petition, p. 24), that the Trial Court ''placed the burden upon the beneficiaries to prove by a preponderance of the evidence that the trustee was actually motivated by bad faith'' (Petition, p. 31), and that the Trial Court ''misplaced this all-important burden'' (Petition, p. 32).

Each quoted statement in the preceding paragraph also is contrary to the fact. The Trial Court reserved decision on respondent's motion to dismiss at the close of plaintiffs' case and ruled that it wanted to hear the defense (R. 1828). Respondent then went forward with its proof. After full consideration of all of the facts and circumstances and all of the evidence, oral and written, the Trial

Court dismissed the complaint on the merits (R. 141). Thus it is evident from the record that the Trial Court based its findings, refusals to find and conclusions on all of the evidence. The Trial Court's findings that respondent met all the requirements of the trust indenture (Finding 265; R. 117), was not actuated in any way by bad faith (Finding 263; R. 117), acted in entire good faith (Finding 264; R. 117) and did not profit (Finding 312; R. 126) or intend to profit (Finding 263; R. 117) by the substitution were not, as petitioners suggest (Petition, p. 24), a Scotch verdict of "not proved guilty". Those findings were made upon all of the facts and circumstances and evidence, including that adduced by respondent.

The findings which the Trial Court made with respect to respondent should be compared by this Court with the findings which the Trial Court made with respect to The New York Trust Company and Manufacturers Trust Company (Findings 310-311; R. 125-126). The Trial Court dismissed the complaint with respect to The New York Trust Company and Manufacturers Trust Company at the close of plaintiffs' case and found that "there is no proof" that they did not act in entire good faith. The Trial Court dismissed the complaint with respect to respondent only at the close of the entire case and found not that there was a lack of proof, but that on all of the proof adduced respondent had "acted in entire good faith" (Finding 318; R. 127).

Petitioners repeatedly state and suggest that it was necessary for respondent to permit the substitution to protect its own position and to save its own loans. They state that "Only by Chase National, as trustee, yielding to its own personal debtor the securities held in trust could 'these bank loans be refunded'"; that respondent "immediately stood senior to the beneficiaries of its trust" and "gained a creditor's senior access" to the securities

released which became a "new part of the general estate of its debtor" (Petition, p. 22). These statements are in direct conflict with the Trial Court's findings.

The Trial Court found that the loan which NEP had with respondent was at all times amply margined (Finding 95; R. 74) and that none of the loans made by respondent was connected directly or indirectly with the substitution of collateral (Finding 150; R. 85). Moreover, the Trial Court refused to find that neither NEP nor any of its subsidiaries possessed on the date of substitution credit or collateral available for bank loans (Refusal 109; R. 171). The Trial Court refused to find that neither NEP nor any of its subsidiaries possessed on the date of substitution funds or credit to meet the January 1, 1932, financial requirements (Refusal 110; R. 171). The Trial Court refused to find that NEP's purpose in making the substitution was to use withdrawn securities as a basis of public financing to pay off bank loans (Refusal 111; R. 171). The Trial Court refused to find that respondent required and obtained increased commitments from NEP's subsidiaries to impress in its favor a prior lien on the earnings of such subsidiaries (Refusal 83; R. 165). The Trial Court refused to find that respondent preferred itself over debenture holders in recourse to the assets of the NEP system (Refusal 54; R. 158).

The Trial Court did find that respondent did not permit the substitution "in order to obtain profit for itself at the expense of debenture holders" (Finding 263; R. 117). The Trial Court further found that respondent "did not profit directly or indirectly from the pledge of the collateral released from under the trust indenture" (Finding 312; R. 126).

Petitioners state that the Trial Court held "that 'undivided loyalty' was not required" (Petition, p. 4). They

state that "not alone did this trustee concededly violate the rule of undivided loyalty" (Petition, p. 28). No citation has been given to support these statements. There was no such holding or concession. The Trial Court found that respondent "did not profit directly or indirectly" (Finding 312; R. 126), and the Trial Court refused to find that respondent "profited" (Refusal 258; R. 213) "stood to profit" (Refusal 257; R. 213), "benefitted" (Refusal 256; R. 212-213), or "expected to benefit" from the substitution (Refusal 268; R. 216).

Petitioners state that the Trial Court "predicated his release of Chase National, in holding, contrary to its concessions, that this National Bank was not a fiduciary" (Petition, p. 7). There is no basis in the record for any such statement. We urged on the motion to dismiss at the close of plaintiffs' case that the duties of a corporate trustee are measured and limited by the provisions of the indenture of trust (R. 1760). The Trial Court held as matter of law in its decision of June 29, 1936, not that respondent "was not a fiduciary" but that its duties, "as trustee, were measured and limited by the provisions of the trust indenture" (Conclusion V; R. 135). In affirming the judgment of the Trial Court, without opinion, the Appellate Division and in turn, the Court of Appeals likewise concluded that "the duties of defendant Chase National Bank, as trustee, were measured and limited by the provisions of the trust indenture".

Petitioners stated in their moving affidavit (R. 3709) on the motion for reargument and to amend the remittitur that "It is the fully considered view of affiant and his associates that the affirmance could only be reached by accepting the concept that the Chase National Bank acted herein as a non-fiduciary trustee". The Court of Appeals dissipated this "fully considered view of affiant and his associates"

by stating that the moving papers did not "present either authority or reason for changing our decision that the liability of the corporate trustee though acting as a fiduciary was limited by the terms of the trust agreement" (R. 3705) and cited *Benton* vs. *Safe Deposit Bank of Pottsville,* 255 N. Y. 260. Thus the Trial Court, the Appellate Division and the Court of Appeals concluded that respondent was a trustee and a fiduciary with its duties measured and limited by the provisions of the trust indenture.

Summary of Respondent's Argument.

(1) Concededly petitioners set up and raised alleged "Federal rights under a Federal statute" for the first time on the motion for reargument and to amend the remittitur. The Court of Appeals denied the motion for reargument, refused to pass upon the alleged "Federal rights under a Federal statute" and denied the motion to amend the remittitur so as to indicate that the alleged "Federal rights under a Federal statute" had been passed upon. Under such circumstances this Court will not entertain jurisdiction.

(2) Petitioners have not set up or claimed any title, right, privilege or immunity under the Constitution or any treaty or statute of the United States, and this Court is, therefore, without jurisdiction (28 USCA 344). The National Banking Act, the alleged statutory provisions involved, gives petitioners no title, right, privilege or immunity.

(3) The record refutes petitioners' claim that they were deprived of property without due process of law. The record shows that judgment was rendered in the regular course of judicial proceedings and in accord with well established law of the State of New York.

POINT I.

This Court is without jurisdiction. Concededly petitioners set up and raised alleged "Federal rights under a Federal statute" for the first time on the petition for rehearing to the highest appellate court of the State of New York. That Court denied the petition and refused to pass upon the alleged "Federal rights under a Federal statute".

The settled rule is that in order to give this Court jurisdiction to review the judgment of a state court the essential Federal question must have been especially set up in the state court at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the state court actually entertains the petition and passes upon the point. *Godchaux Co.* vs. *Estopinal,* 251 U. S. 179, 181.

It must affirmatively appear from the record that the highest appellate court of a state considered, passed upon and determined the Federal question. *Southwestern Bell Telephone Co.* vs. *Oklahoma,* 303 U. S. 206, 212, 213; *Consolidated Turnpike Co.* vs. *Norfolk & Oceanview Ry. Co.,* 228 U. S. 326, 333, 334. The statement by the highest appellate court of a state that it has passed upon a Federal question must be explicit and definite. *McGoldrick* vs. *Gulf Oil Corporation,* 309 U. S. 2, 3*; *Valley Steamship Company* vs. *Wattawa,* 244 U. S. 202, 205. The refusal by the highest appellate court of a state to entertain a Federal question not presented below is accepted by this Court as conclusive. *Chicago, Indianapolis & Louisville Ry. Co.* vs. *McGuire,* 196 U. S. 128, 132; *Pennsylvania Railroad Co.* vs. *Illinois Brick Co.,* 297 U. S. 447, 463.

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* Petition for rehearing based upon an amended remittitur explicitly showing decision on a Federal question, 282 N. Y. 622, was granted. See 309 U. S. 414, 416.

The burden is on petitioners to show that the Federal question was considered, passed upon and determined. There will be no presumption that the court considered the question. This Court's jurisdiction cannot be founded upon presumption or surmise. *Chicago, Indianapolis & Louisville Ry. Co.* vs. *McGuire,* 196 U. S. 128, 132; *Lynch* vs. *New York,* 293 U. S. 52, 54.

If the highest appellate court of a state refuses to entertain and dismisses a petition for rehearing without passing upon the Federal question, this Court will not review the state court's action. In other words, it must affirmatively appear that the Federal question was in fact passed upon in considering the motion for rehearing. Unless this is so this Court will not assume jurisdiction. *McCorquodale* vs. *State of Texas,* 211 U. S. 432, 437; *Forbes* vs. *State Council of Virginia,* 216 U. S. 396, 399; *Herndon* vs. *Georgia,* 295 U. S. 441, 443; *Southwestern Bell Telephone Co.* vs. *Oklahoma,* 303 U. S. 206, 212, 213.

Concededly the alleged "Federal rights under a Federal statute" were here set up and raised for the first time in the petition for rehearing and to amend the remittitur before the Court of Appeals, the highest appellate court of the State of New York (R. 3712, 3713; Petition, p. 5). The Court of Appeals denied the petition for rehearing in a one-sentence opinion, reading:

> "Ordered, that the said motion for reargument be and the same hereby is denied with ten dollars costs and necessary printing disbursements on the ground that it does not present either authority or reason for changing our decision that the liability of the corporate trustee though acting as a fiduciary was limited by the terms of the trust agreement (Benton *v.* Safe Deposit Bank of Pottsville, 255 N. Y. 260)." (R. 3705)

The opinion clearly shows that the Court of Appeals did not consider, pass upon and determine the alleged "Federal rights under a Federal statute." It based the denial upon the established law of the State of New York. This is the same law upon which the Trial Court and the Appellate Division predicated their decisions.

There was no "explicit" statement nor does it affirmatively appear from the decision of the Court of Appeals that the alleged "Federal rights under a Federal statute" were considered, passed upon and determined. On the contrary, that decision clearly indicates that the alleged "Federal rights under a Federal statute" were not considered, passed upon and determined.

At the same time that the Court of Appeals denied the petition for rehearing it refused to amend the remittitur at petitioners' request so as to show "that a Federal question or claim herein was presented, considered and passed upon" (R. 3707-3708). There was no way in which the Court of Appeals could more conclusively demonstrate that it had not considered, passed upon and determined the alleged "Federal rights under a Federal statute" and that it had refused to consider, pass upon and determine such alleged rights than by denying the motion to amend the remittitur. Indeed, this Court has taken cognizance of the practice of the Court of Appeals of the State of New York to amend remittiturs in cases where that court has considered, passed upon and determined Federal questions, *Lynch* vs. *N. Y.*, 293 U. S. 52, 55.

The record in this case shows affirmatively that the alleged "Federal rights under a Federal statute" were set up and raised for the first time on the petition for rehearing. The Court of Appeals has stated repeatedly that it will not pass upon issues not raised below and mentioned for the first time in the Court of Appeals, *Maloney* vs. *Hearst*

Hotels Corporation, 274 N. Y. 106, 111; *Persky* vs. *Bank of America Nat. Association,* 261 N. Y. 212; *Nicholson* vs. *Greeley Square Hotel Co.,* 227 N. Y. 345, 349; *Blair* vs. *Flack,* 141 N. Y. 53, 56, 58. It not only followed its established practice in this case, but expressly refused to amend the remittitur to show that it had considered, passed upon and determined petitioners alleged "Federal rights under a Federal statute".

Petitioners recognize these facts for they go one step further and argue that this case comes within an exception to the general rule. They say that where the highest appellate court of a state reverses or affirms a judgment upon a new theory or upon construction of a statute which for the first time threatens rights under the Constitution, then the Federal question is timely raised on petition for rehearing whether or not the highest appellate court entertains or passes upon the new issue. They cite *Herndon* vs. *Georgia, supra,* and other cases as authority. They ignore the fact that this is not a case where the alleged "Federal rights under a Federal statute" arise from the unanticipated act of the highest State court by its affirmance of a judgment of the lower court upon a theory or construction of statute which threatened for the first time rights under the Constitution or statutes of the United States.

In our case there was only one opinion. That was the opinion of the Trial Court. Both the Appellate Division and the Court of Appeals affirmed the decision of the Trial Court without opinion, and not on any new theory or construction of statute. Moreover, the decision of the Court of Appeals in denying the petition for rehearing shows that that court affirmed the decision of the Trial Court upon the same theory and that it did not adopt "the concept of a non-fiduciary trustee". This fact is emphasized by the language of the decision of the Court of Appeals.

Petitioners had urged on the petition for rehearing that the Court of Appeals in affirming the judgment of the Appellate Division, which in turn had affirmed the judgment of the Trial Court, was adopting "the concept of a non-fiduciary trustee" (R. 3713). The Court of Appeals refuted petitioners' contention in plain and unmistakable language. It said that the petition did not "present either authority or reason for changing our decision that the liability of the corporate trustee though acting as a fiduciary was limited by the terms of the trust agreement" (R. 3705). It cited *Benton* vs. *Safe Deposit Bank of Pottsville*, 255 N. Y. 260. This is an authority upon which the Trial Court's decision was predicated. It thus clearly appears that there was no threat to petitioner's rights under the Constitution or statutes of the United States by virtue of any decision of the Court of Appeals.

During the two and one-half months that intervened between the rendition of the Trial Court's opinion and the signing of the Trial Court's decision, petitioners had ample opportunity to decide upon and formulate their alleged "Federal rights under a Federal statute." They were given a further opportunity to decide upon and formulate their alleged "Federal rights under a Federal statute" in preparing their exceptions to the findings of the Trial Court.

The Trial Court held as matter of law that "The duties of defendant The Chase National Bank, as trustee, were measured and limited by the provisions of the trust indenture" (Conclusion V; R. 135). Petitioners' exception to that conclusion was "on the ground that that conclusion of law is without any evidence tending to sustain it and contrary to law" (Exception 124; R. 296). After the Trial Court had rendered its opinion, petitioners submitted to

the Trial Court 316 proposed findings of fact (R. 217) and 37 proposed conclusions of law (R. 222). They filed 349 exceptions to the decision of the Trial Court (R. 329). Nowhere in their proposed findings, conclusions or exceptions did they make mention of their alleged "Federal rights under a Federal statute". They did not set up or raise their alleged "Federal rights under a Federal statute" in the Trial Court, in the Appellate Division or even in the Court of Appeals until after the Court of Appeals had rendered its judgment of affirmance. They set up and raised the question of their alleged "Federal rights under a Federal statute" for the first time on the petition for rehearing. The Court of Appeals not only did not consider, pass upon and determine that question, but in clear and unequivocal language indicated that it refused to do so.

We submit that on the basis of the record in this case and on the basis of this Court's decisions petitioners' alleged "Federal rights under a Federal statute" have not been timely raised.

POINT II.

Petitioners have shown no right or privilege under any Federal statute so as to confer jurisdiction upon this Court.

Petitioners claim that the jurisdiction of this Court is sustained since they specifically set up "Federal rights under a Federal statute: *National Banking Act,* 12 U. S. C. A.;" (Petition, p. 3).

Nowhere in the petition are the rights which petitioners claim under that statute specified or defined. They cite only Section 11(k) of the Federal Reserve Act (12 U. S.

C. A. 248k), which authorized the Board of Governors of the Federal Reserve System:

> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.
>
> "Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this chapter."

Petitioners argue that in some way (which they do not explain) the fact that Congress has granted to national banks the corporate power to compete with state institutions in the corporate fiduciary field places upon national banks duties and liabilities different from and greater than those assumed by state institutions acting in the same fiduciary capacities, and in the instant case, different from and greater than the duties and liabilities assumed by The Equitable Trust Company of New York when it became trustee of the same trust indenture.

Petitioners point to no portion of Section 11(k) which either expressly or impliedly provides that national banks shall have duties and liabilities different from and greater

than those assumed by state institutions acting in the same fiduciary capacities. They cite a great number of cases, beginning with *M'Culloch* vs. *Maryland,* but the cases cited all have to do either with the power of Congress to create national banks: *M'Culloch* vs. *Maryland, Osborn* vs. *Bank of United States, First National Bank* vs. *Fellows, Missouri ex rel. Burnes National Bank* vs. *Duncan,* or the power of states to tax or in other ways to impair the functions of national banks: *Ex Parte Worcester County National Bank, Easton* vs. *Iowa, Colorado National Bank* vs. *Bedford,* or involve the violation of express limitations on powers granted to national banks, or the liabilities and immunities of the directors thereof: *Yates* vs. *Jones National Bank, Jones National Bank* vs. *Yates, Awotin* vs. *Atlas Exchange National Bank, Deitrich* vs. *Greaney, Inland Waterways Corporation* vs. *Young,* and *City of Yonkers* vs. *Downey.*

It is apparent from a reading of Section 11(k) of the Federal Reserve Act that it has not the slightest relevancy. The section confers upon national banks the corporate power to compete with state institutions in the corporate fiduciary field. The fact that petitioners refer to a Federal statute and claim a right thereunder without more is not sufficient to meet the jurisdictional requirements of this Court. *Chicago, Rock Island & Pacific Ry. Co.* vs. *Maucher,* 248 U. S. 359. In that case plaintiff in error, to support his right to contract against liability, pointed to the enactment of the Carmack Amendment (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595) which dealt with the power of carriers to contract with respect to limitation of liability on shipments of property. The state trial court had held that liability was to be determined by the

law of Nebraska and ruled against plaintiff in error. This Court dismissed the writ of error, holding that the case presented no substantial federal question, and pointed out that the statute cited related only to shipments of property and not to transportation of persons.

In the instant case, petitioners refer to Section 11(k) of the Federal Reserve Act which grants corporate power to national banks so that they may compete with state institutions in the corporate fiduciary field. This Court has held on prior occasions that Section 11(k) of the Federal Reserve Act was adopted in order to permit national banks to compete with state institutions. *First National Bank* vs. *Fellows ex rel. Union Trust Company,* 244 U. S. 416; *Missouri ex rel. Burnes National Bank* vs. *Duncan,* 265 U. S. 17. Moreover, in these cases, this Court has held expressly that although Section 11(k) of the Federal Reserve Act granted to national banks the corporate power to act as corporate fiduciaries, the regulation and administration of corporate fiduciary activities was subject to state law and regulation. Thus, in *First National Bank* vs. *Fellows ex rel. Union Trust Company, supra,* this Court said at page 426:

> "Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question."

In *Ex Parte Worcester County National Bank,* 279 U. S. 347, this Court said, in passing upon Section 3 of the Act of Congress of February 25, 1927, which permitted the consolidation of national banks and state institutions:

> "We think § 3 enjoins upon the national bank complete conformity with the Massachusetts law in its conduct of estates of deceased persons when acting as trustee or administrator thereof." (P. 360)

In *Union National Bank* vs. *Louisville, New Albany & Chicago Ry. Co.,* 163 U. S. 325, this Court recognized the distinction between the grant of power by act of Congress, and the right to have an equal administration of a rule established by the state court under a statute granting to national banks the right to charge interest at the same rate as that charged by the states in which they operated. It was there stated:

> "A sufficient answer is that the true construction of state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks. The decision here was not against any equality of right, but only a determination of the meaning of the state law as applied to all creditors. It therefore denied no rights given by the Federal statute and involved no judgment adverse to plaintiff as to its meaning and effect." (P. 331)

In short, the purpose and object of Congress in enacting the National Banking Act was to leave national banks as

to their contracts in general under the operation of state law, and thereby invest them as Federal agencies with local strength, while, at the same time, preserving them from undue state interference.

Thus there is not even the possibility of any conflict between Section 11(k) of the Federal Reserve Act and the decisions of the New York State courts that the duties and liabilities of corporate trustees, whether national banks or state institutions, are measured and limited by the terms of the trust indenture. To adopt the language of this Court in *Chicago, Rock Island & Pacific Ry. Co.* vs. *Maucher, supra,* the language of Section 11(k) "is so clear as to leave no ground for the contention that Congress intended to deal with" the duties and liabilities of national banks acting as corporate trustees.

In an attempt to show that Section 11(k) of the Federal Reserve Act was intended to impose upon national banks higher duties than those imposed on state banks by state law, petitioners quote a portion of House Report No. 479, 65th Congress, 2nd Session, which preceded the adoption of the 1918 Amendment of Section 11(k) (Petition, p. 30). The provisions of the amendment to which the House Report referred to as "these provisions" related to requirements as to segregation of assets and the keeping of records. Petitioners, in quoting the House Report omit, without indicating the omission, the last half of a sentence which they purport to quote. The entire sentence reads:

> "These provisions are intended to impose safeguards upon the exercise of these fiduciary powers by national banks, *and to have national banks in the exercise of these powers conform as fully as is practicable with state requirements.*"

The portion omitted entirely destroys the inference petitioners seek to draw.

We submit that in pointing to Section 11(k) of the Federal Reserve Act, petitioners have not shown a right under Federal statute sufficient to give this Court jurisdiction. The right asserted is without substance as is indicated not only by the language of the section itself, but by the historical background of the section.

Apparently forsaking their argument that Section 11(k) gives them some right, petitioners frequently refer to "federal law and policy", and suggest that such law requires greater duties and greater liability of a national bank which succeeds a state bank as corporate trustee than that which was required of the state bank while it was acting in the same capacity and under the same instrument. It is thus stated that the state court's decision in the instant case permitted respondent to limit its duties and liabilities by the trust indenture and that such holding was "in conflict with paramount controlling federal law and policy." But nowhere in the entire petition is such federal law or policy defined or specified. On the contrary petitioners concede that there are no precedents of this Court distinguishing between the duties and liabilities of a state bank acting as trustee under a given instrument and the duties and liabilities of a national bank succeeding the state bank as corporate trustee under the same instrument. Petitioners say (Petition, p. 34):

> "Again and again this Court has considered and defined the powers, rights, privileges and immunities of National Banks but never their fiduciary duties, obligations or disabilities. This case then is one of first impression involving the construction, application and interpretation of such duties and disabilities of a National Bank permitted under Federal law to act as a 'trustee' 'or in any other fiduciary capacity'."

The Trust Indenture Act of 1939, 53 Stat. 1149 (15 U. S. C. A. 77aaa) conclusively shows that there was no federal law or federal policy prohibiting national banks in competition with state banks from measuring and limiting their duties in the trust indenture. The Trust Indenture Act was designed to place all banks acting as corporate trustees, whether national or state, under the regulation of Federal statute. The enactment of that bill is conclusive demonstration that no "federal law or policy" existed governing the powers, duties and liabilities of national banks as trustees under corporate indentures.

POINT III.

Petitioners have not been deprived of property without due process of law.

The second ground urged by petitioners to sustain jurisdiction is that the decision below was arbitrary and capricious, in violation of settled principles of law, contrary to undisputed facts, and in disregard of formal concessions of respondent, and that therefore petitioners were unconstitutionally deprived of their property without due process of law. Petitioners cite three cases, *Scott* vs. *McNeal,* 154 U. S. 34, where a state court had refused to return property conveyed by the administrator of a person later found to be living; *Postal Telegraph Cable Co.* vs. *Newport,* 247 U. S. 464, where the state court had held under the doctrine of *res adjudicata* that a litigant was bound by the principle of a case to which the litigant was not a party, and finally, *Williams* v. *Tooke,* 108 F. (2d) 758, where a litigant sought to have a federal district court review a determination of the highest state court of Texas. No further attempt is made in the petition to

show that the decision of the Trial Court in our case was arbitrary or capricious.

This case was decided under the well established law of the State of New York and in conformity with a long line of New York decisions.

> *Hunsberger* vs. *Guaranty Trust Co.* (1914), 164 N. Y. App. Div. 740, aff'd 218 N. Y. 742;
>
> *Green* vs. *Title Guarantee and Trust Co.* (1928), 223 N. Y. App. Div. 12, aff'd 248 N. Y. 627;
>
> *Benton* vs. *Safe Deposit Bank of Pottsville* (1931), 255 N. Y. 260;
>
> *Greene* vs. *Continental Bank and Trust Co.* (1935), 267 N. Y. 519;
>
> *Ansbacher* vs. *New York Trust Co.* (1939), 280 N. Y. 79.

The Restatement of the Law of Trusts expressly approves the doctrine upon which this case was decided. Thus in Section 174, Com. d, it is stated:

> "d. *Standard fixed by terms of the trust.* By the terms of the trust the requirement of care and skill may be relaxed or modified. A provision in the terms of the trust fixing a standard of care or skill lower than that which would otherwise be required of a trustee is strictly construed."

All that was decided by the state court and all that is involved in this case is the construction of a trust indenture, and the liability of the trustee thereunder. This is not a question of federal common law, for this Court has held that there is no such law,* but of state law applicable to contracts, trusts and torts.

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* *Erie R. R. Co.* vs. *Tompkins,* 304 U. S. 64, 78; *Ruhlin* vs. *New York Life Insurance Co.,* 304 U. S. 202, 205.

Capital National Bank vs. *First National Bank of Cadiz*, 172 U. S. 425, is a pertinent authority. There one national bank brought suit against another national bank and its receiver for the recovery of funds collected from notes transmitted to the latter for collection and remittance. The Nebraska trial court found that the moneys collected constituted a trust fund and directed payment to the plaintiff by the receiver. The receiver's motion for a new trial was overruled and the case was taken to the Supreme Court of Nebraska, which affirmed the judgment of the trial court. Thereupon the receiver applied for a rehearing in the Supreme Court of Nebraska on the ground, among others, that the decree establishing the trust fund and declaring a lien would work a preference and priority to certain creditors and was "in violation of the provisions of the national bank act". The Supreme Court of the United States, in holding that no federal question was involved and that it had no jurisdiction, said:

> "In our opinion no Federal right was specially set up or claimed in this case at the proper time or in the proper way; nor was any such right in issue and necessarily determined; but the judgment rested on non-Federal grounds entirely sufficient to support it.
>
> "The record discloses no Federal question asserted in terms save in the application to the Supreme Court for a rehearing, when the suggestion came too late.
>
> "The petition did, indeed, allege that the Capital National Bank was organized under the banking act, and that a receiver was appointed, who took possession of the bank's assets and of all trusts and moneys held by it in a fiduciary capacity, and the answer admitted these averments, respecting which there was no controversy, yet no right to appropriate trust funds

was claimed by defendant under any law of the United States, nor was it asserted that any judgment which might be rendered for plaintiff would be in contravention of any provision of the banking act.

* * * * *

"This rule [that right must be claimed before judgment] was not complied with here, nor was any Federal question in terms decided, while on the contrary the judgment was explicitly rested on non-Federal grounds.

"The contention of plaintiff was that the Capital National Bank had money in its hands which belonged to plaintiff; did not belong to the bank; had never formed part of its assets; and was held by the bank in trust for plaintiff.

"The right to the money was considered by the trial court in the light of general equitable principles applicable on the facts, and the court adjudged that the money constituted a trust fund to which plaintiff was entitled.

* * * * *

"We know of no provision of the banking act which assumes to appropriate trust funds in the possession of insolvent banks, or other property in their possession to which they have no title, and it is clear that the state courts had jurisdiction to determine whether this money was or was not a trust fund belonging to plaintiff.

"The receiver made no effort to remove the litigation to the Circuit Court, contested the issues on a general denial, and set up no claim of a right under Federal statutes withdrawing the case from the operation of general law.

"In these circumstances the result is that this court has no jurisdiction to revise the judgment of the Supreme Court of Nebraska, * * *." (pp. 431-434)

Conclusion.

It is respectfully submitted that

1. The alleged "Federal rights under a Federal statute" were not timely raised;

2. Petitioners have shown no title, right, privilege or immunity under the Constitution, or any treaty or statute of the United States;

3. The record affirmatively shows that the decisions of the state courts did not deprive petitioners of property without due process of law; and

4. The petition for a writ of certiorari to the Supreme Court of the State of New York should be denied.

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